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# HOSPITALS WIN IN RARE SUPREME COURT DECISION PERTAINING TO MEDICARE REIMBURSEMENT

On June 3, 2019, the Supreme Court of the United States issued its opinion in *Azar v. Allina* (Case No. 17-1484) and affirmed the provider-friendly decision from the Court of Appeals for the District of Columbia. The win for hospitals comes following a lengthy challenge to various policies issued by the Centers for Medicare & Medicaid Services ("CMS") regarding the treatment of Medicare Advantage (also known as Medicare Part C) days in the Medicare Disproportionate Share ("DSH") reimbursement. The Supreme Court stated that CMS must provide adequate notice and allow providers to comment on anything that establishes a "substantive legal standard governing the scope of benefits, the payment for services, or the eligibility of individuals, entities, or organizations to furnish or receive services or benefits under [Medicare]." 42 U.S.C. § 1395hh(a)(2).

This decision pertains to hospitals challenging the location of Medicare Part C days in the DSH calculation, but it also has implications beyond this case. The ruling could impact other existing cases and invite new legal challenges in instances where CMS has not gone through proper notice-and-comment rulemaking in areas that would be considered a creation or change to a "substantive legal standard."

### AT ISSUE: MEDICARE DSH REIMBURSEMENT

The issue that led to this Supreme Court decision centered around where to count Medicare Part C days in the Medicare DSH calculation. Medicare DSH payment is premised around the sum of two fractions, the Medicare Fraction and the Medicaid Fraction. Originally, Medicare Part C days were counted in the Medicaid Fraction if those days were associated with patients that were also dually eligible for Medicaid. In 2003, CMS proposed rulemaking to formally adopt this practice, but it declined to finalize it in the FFY 2003 Inpatient Prospective Payment System's Final Rule. Then, in the 2004 Final Rule, CMS made an about-face and abruptly determined that Part C days belonged in the Medicare fraction, which notably had the effect of reducing Medicare DSH reimbursement for many hospitals. Hospitals challenged this decision, and CMS eventually acquiesced, going through complete notice-and-comment rulemaking to impose this change for these days in 2013. However, the present case that led to this Supreme Court decision challenged CMS's 2014 publication of the 2012 Supplemental Security Income ("SSI") Ratios on the CMS website, in which the Part C days were still in the Medicare Fraction. The government's position was the website publication of the SSI Ratios did not rise to substantive rulemaking.

### THE SUPREME COURT'S OPINION

The Supreme Court's opinion leaves no question that the Medicare Act's use of the word "substantive" is different from the Administrative Procedures Act's ("APA") use of the same word. Justice Gorsuch, writing for the majority, stated "...the Medicare Act contemplates that 'statements of policy' like the one at issue here *can* establish or change a '*substantive* legal standard.'" He goes on to state that "under the APA, statements of policy are *not* substantive; instead they are grouped with and treated as interpretive rules." The Supreme Court expressed its reluctance to buy into the policy argument the government advanced (i.e., that this interpretation would open the floodgates of litigation with challenges of other CMS policy that did not go through notice-and-comment rulemaking). The Supreme Court further concluded that it was for Congress to determine whether the government's policy argument merits statutory changes, noting that the government did not identify any interpretive manual provisions that had been the subject of recent litigation and may be overturned, calling its "floodgate opening" argument into question.

### WHAT HAPPENS NEXT?

CMS has already gone through complete notice-and-comment rulemaking over the inclusion of Part C days in the DSH calculation that originally created this dispute and led to this decision. However, there are many hospitals that have preserved appeal rights for their 2004-2014 cost reports that are eligible to appeal this issue. CMS's plans to address these hospitals' appeals is not yet known. To the extent your hospital still has Medicare cost report years between 2004-2014 that are eligible for a PRRB appeal, you should consider preserving those appeal rights. For most hospitals, though, the appeal windows are likely closed because the notices of program reimbursement are too old.

Additionally, this new clarification on the requirement for notice-and-comment rulemaking for the establishment or change of a "substantive

legal standard" will potentially extend to other CMS policies besides Medicare DSH, even though the record in the *Allina* cases suggests that its scope is more limited than the government would have us believe.

**PRACTICAL TAKEAWAYS AND RECOMMENDATIONS**

This decision is favorable for hospitals that have preserved appeal rights for this issue regarding where to count Medicare Advantage days for Medicare DSH reimbursement, but the timeline for relief is uncertain and may take time.

Hospitals should be vigilant to watch for situations that create or change a substantive legal standard governing the scope of benefits, payment for services or eligibility of individuals, entities or organizations to furnish or receive services or benefits under Medicare. If that substantive legal standard was created or changed without notice and opportunity to submit comments to CMS, that might be a violation under this *Allina* standard.

If you have any questions or would like additional information about this topic, please contact:

- Maureen O'Brien Griffin at 317-977-1429 or mgriffin@hallrender.com;
- Elizabeth A. Elias at 317-977-1468 or eelias@hallrender.com;
- Daniel F. Miller at 414-721-0463 or dmiller@hallrender.com;
- N. Kent Smith at 317-977-1419 or ksmith@hallrender.com; or
- Your regular Hall Render attorney.